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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Los Verdes III, LLC

Serial No. 78/043,560

Melissa R. Kauffman and Barbara Weil Laff of Ireland
Stapleton Pryor & Pascoe, P.C. for Los Verdes III, LLC.

Howard Smiga, Trademark Examining Attorney, Law Office 102
(Thomas V. Shaw, Managing Attorney).

Before Bucher, Rogers and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Los Verdes III, LLC seeks registration on the
Principal Register for the mark CHERRY CREEK COUNTRY CLUB
for goods and services placed in four classes, as follows:

"Printed matter, namely score cards, playing
cards, note cards, and golf yardage books," in
International Class 16;

"Clothing, namely shirts, hats, t-shirts," in
International Class 25;

"Golf Accessories, namely golf bags, golf tees, and
golf towels," in International Class 28; and

"Golf courses, golf club services, golf tournaments, instruction in the field of golf," in International Class 41.¹

The Trademark Examining Attorney has refused registration under Section 2(e)(2) of the Trademark Act, 15 U.S.C. §1052(e)(2), on the ground that, when used in connection with the identified goods and services specified in the application, the mark is primarily geographically descriptive of them.

As to the goods in International Class 25 only, the Trademark Examining Attorney also has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods in International Class 25, so resembles the mark "CHERRY CREEK and design" as shown below:



¹ Application Serial No. 78/043,560 was filed on January 17, 2001 based upon applicant's allegations of a *bona fide* intention to use the mark in commerce. Applicant has since filed an amendment to allege use as to the goods in International Class 25 and the services in International Class 41. Classes 16 and 28 remain based upon Intent-to-Use.

registered for "clothing, namely, sport coats, blouses, skirts, slacks, shirts, T-shirts, shoes, hats, jackets, coats, dresses, scarves and belts," also in International Class 25,² that it would be likely to cause confusion, to cause mistake or to deceive.

When the examining attorney made both refusals to register final, applicant filed a notice of appeal. Briefs have been filed, but no oral hearing was requested.

We affirm the refusals to register.

Primarily Geographically Descriptive

Both applicant's attorney and the Trademark Examining Attorney agree that, in order for registration of a mark to be properly refused on the ground that it is primarily geographically descriptive of the applicant's goods and/or services, it is necessary to show that the mark sought to be registered is the name of a place generally known to the public, and that the public would make an association between the named place and the goods and/or services; that is, purchasers would believe that the services and the goods for which the mark is sought to be registered originate in that place. See In re Societe Generale des

² Registration No. 2,176,521, issued on the Principal Register on July 28, 1998. The registration states that the mark is lined for the colors red and green, although color is not claimed as a feature of the mark.

Eaux Minerals de Vittel S.A., 824 F.2d 957, 3 USPQ2d 1450 (Fed. Cir. 1987); In re JT Tobacconists, 59 USPQ2d 1080 (TTAB 2001); and In re California Pizza Kitchen Inc., 10 USPQ2d 1704 (TTAB 1988). See also, In re Loew's Theatres, Inc., 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985).

Primary significance of "Cherry Creek"

Although applicant's mark is CHERRY CREEK COUNTRY CLUB, our primary focus under Section 2(e)(2) is on the term "Cherry Creek," because, as noted by the Trademark Examining Attorney, the addition of generic and/or merely descriptive words to a geographical term does not avoid the refusal of primary geographical descriptiveness. See In re U.S. Cargo Inc., 49 USPQ2d 1702 (TTAB 1998); In re Cambridge Digital Systems, 1 USPQ2d 1659 (TTAB 1986); and In re BankAmerica Corp., 231 USPQ 873 (TTAB 1986).

The Trademark Examining Attorney contends that the entire record (e.g., the evidence provided by the Trademark Examining Attorney as well as evidence provided by the applicant) supports the fact that CHERRY CREEK identifies a real and significant (i.e., not obscure) geographic location, and that the primary meaning of the mark CHERRY CREEK COUNTRY CLUB is its geographic meaning.

While applicant acknowledges that Cherry Creek flows through Denver,³ applicant emphasizes that "the creek does not run through the Country Club." (Applicant's response of December 4, 2001). However, the Trademark Examining Attorney placed maps into the record showing that the banks of Cherry Creek form the southwest border of applicant's golf course and country club. In fact, applicant's membership brochure notes that its exclusive, private country club is "nestled between Cherry Creek and the historic Highline Canal." Hence, applicant's golf course and related services, as well as the club house and gift shop which will presumably be selling the listed goods, will all be located next to Cherry Creek.

Under the case law, it is clearly the perception of the relevant public as to the geographical significance of the mark that is ultimately controlling. We must determine whether the Trademark Examining Attorney has made a *prima facie* case that the relevant public will perceive the primary significance of CHERRY CREEK COUNTRY CLUB to be geographic.

³ We take judicial notice of the fact that Denver is the largest city in Colorado (1990 population of 467,610) and the financial, administrative and transportation center of the Rocky Mountain region. Denver is located on the South Platte River at the mouth of Cherry Creek. The Columbia Gazetteer of North America, ©2000.

The initial Trademark Examining Attorney conducted a NEXIS search ["CHERRY CREEK" W/3 COLORADO] and got 1422 hits while the current Trademark Examining Attorney conducted his own NEXIS search ["CHERRY CREEK" and DENVER] and got 22,916 hits. According to the more than two-dozen NEXIS stories placed into the record by the Trademark Examining Attorney, the most frequent occurrences of the term in the Denver media are references to the neighborhood that derived its name from the body of water, and its associated school districts and shopping venues. Of the stories placed in the record, only one story made reference to the creek itself while two others named Denver landmarks closely associated with the creek:

"Goldstein points out that, unlike most major American cities, downtown [Denver] is not laid out on a north-south grid. It's cocked slightly, lined up with Cherry Creek and the South Platt River. So Northwest is really north."
The Denver Post, March 11, 2002.

"She tried the trapeze because she was afraid of heights. 'You're talking to a woman who doesn't drive across Cherry Creek Dam,' she says."
Rocky Mountain News, March 8, 2002.

"In December and January, project officials relocated 100 prairie dogs from two colonies along I-25 and I-225 to Cherry Creek State Park after getting permission from Arapahoe County..."
The Denver Post, March 7, 2002.

We conclude that over the years, the creek name has been incorporated into a variety of related place names.

It is obvious from the sheer volume of stories that "Cherry Creek" - the neighborhood, the school sports teams, the shopping venues, and, yes, the namesake body of water⁴ - is generally known to the public.

However, apart from any disagreement over applicant's geographical proximity to the body of water, applicant places a great deal of emphasis on the fact that Cherry Creek has given its name to an upscale neighborhood located in Denver, seven miles away from the country club. The village of Cherry Creek has upscale department stores, boutiques, art galleries, salons, fine restaurants, cafes, nightspots and other entertainment, etc. Accordingly, applicant argues "that the term 'Cherry Creek' has a meaning other than the body of water that runs through Denver. In fact, 'Cherry Creek' is used throughout the state to connote abundance and wealth" (Applicant's reply brief, p. 1).

Applicant argues that this case is analogous to the Board's earlier finding that in light of the prominent, significant meaning of the term HOLLYWOOD as referring to

⁴ The Gazetteer entry for Cherry Creek also supports this conclusion. Cherry Creek is 64 miles long, flowing north to the South Platte River. Cherry Creek Dam (140 feet high and 14,300 feet long) forms Cherry Creek Lake, the lake located within Cherry Creek State Park. The Columbia Gazetteer of North America, ©2000. (The Gazetteer makes no mention of a Cherry Creek village in Denver.)

the nation's entertainment industry in general, the Office had not established that the primary significance of the term "Hollywood" is that of a geographic location in Los Angeles. In re International Taste Inc. 53 USPQ2d 1604 (TTAB 2000).

We find that the Trademark Examining Attorney has established that "Cherry Creek" is a real and significant geographic location in Colorado. On the other hand, unlike the applicant in the HOLLYWOOD case, we find that applicant has failed to rebut the *prima facie* showing that the primary meaning of the mark is the geographic meaning. By contrast with a record showing that HOLLYWOOD has come to be a shorthand reference to the American film industry, on this record, we cannot determine that the primary connotation of the name "Cherry Creek" is, as applicant contends, luxury and quality. For even if the record were to convince us that "Cherry Creek" has a widely-shared connotation of luxury and quality (which it has not), the mere fact that these other connotations may have been added to this designation does not necessarily alter the primacy of its geographical significance. See In re Opryland USA Inc., 1 USPQ2d 1409 (TTAB 1986).

Goods/place association

As to this second prong of the test under Section 2(e)(2) of the Act, applicant analogizes the instant case to reported decisions involving two street names applied as marks to perfume - SUNSET BOULEVARD and RODEO DRIVE.⁵ In similar fashion, applicant argues that the Trademark Examining Attorney has failed to show "that the term 'Cherry Creek' is associated with golf course communities ..." (applicant's appeal brief, p. 5).

We find that this case can be distinguished from the facts of Jacques Bernier and Gale Hayman. In these cases, the issue was whether the record supported a conclusion that purchasers would believe these two named streets in Southern California were places associated with the production and/or sale of perfume. The issue herein is whether prospective consumers would believe that Cherry Creek might provide a setting for services recited as "Golf courses, golf club services, golf tournaments, instruction

⁵ "Nothing in the record, however, indicates or even suggests that purchasers would believe that Sunset Boulevard was the place of manufacture or production of the perfume and cologne. Indeed, there is no indication that any perfume or cologne is manufactured or produced on Sunset Boulevard. See In re Jacques Bernier, Inc., 894 F.2d 389, 13 USPQ2d 1725 (Fed. Cir. 1990) [RODEO DRIVE not primarily geographically deceptively misdescriptive when applied to applicant's perfume]. Nor is there any evidence that applicant's goods are even sold on Sunset Boulevard." In re Gale Hayman Inc. 15 USPQ2d 1478 (TTAB 1990).

in the field of golf," as well as the collateral products listed above. Applicant's membership brochure describes its 18-hole championship golf course designed by Jack Nicklaus as being next to Cherry Creek. Hence, prospective purchasers who are acquainted with the Denver area will assume that these golfing services are being produced in the vicinity of Cherry Creek. According to the membership brochure and applicant's arguments herein, the club's 25,000 square foot clubhouse will have a gift shop selling souvenir products bearing the club's name. Therefore, we find that members of the relevant public, which includes golfers among the substantial Denver area population, would make a services/place and goods/place association herein. Hence, the refusal of registration as to all four classes of goods and services is hereby affirmed.

Likelihood of confusion

Applicant argues that the registrant's clothing items consist of colorful and patterned prints for plus-sized women, while its own items of clothing are souvenir sports wear in standard sizes; that registrant's mark with its depiction of cherries is a product mark for a line of clothing, while its mark connotes a golf course having souvenir sports wear; and that registrant's goods will be

sold in retail stores, while its sports wear will be sold in its own golf club gift shop.

By contrast, the Trademark Examining Attorney argues that the dominant feature of both marks, CHERRY CREEK, is identical; that "shirts, hats and T-shirts" are listed in both the cited registration and the instant application; and that there are no restrictions in either registrant's or applicant's channels of trade.

In the course of considering this refusal, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973). This case sets forth the factors, which if relevant evidence is of record, must be considered in determining likelihood of confusion. In any likelihood of confusion analysis, two key factors are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to an examination of the goods. As noted by the Trademark Examining Attorney, some of the clothing items identified in the application and registration are identical (e.g., shirts, hats and T-shirts). Yet applicant's attorney has argued that based upon her own investigation of registrant's goods, the

respective goods are clearly different. However, we agree with the Trademark Examining Attorney that despite what may have been revealed about registrant's products or channels of trade by way of applicant's counsel's telephone inquiry of registrant, there is no limitation in the identification of goods in the cited registration. Nor is there a limitation in applicant's identification of goods. Hence, we must presume that registrant's and applicant's goods, including some of which are legally identical, will travel in the same channels of trade to the same classes of ordinary consumers.

Turning then to the marks, as our principal reviewing court, the Court of Appeals for the Federal Circuit, has pointed out, "[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The design feature included in registrant's mark does create a somewhat different appearance in the marks, but it is the literal elements that are dominant as this is the way consumers will call for the goods in the marketplace. While applicant's mark also includes the term COUNTRY CLUB, this terminology for collateral and/or

souvenir items for golfing must also be seen as less significant than the words CHERRY CREEK. That is, when viewed in their entireties, the two marks are quite similar as to sound and appearance. As to meaning, the connotation of applicant's mark and of registrant's mark is the same - namely, of a place known as "Cherry Creek." Accordingly, we find that the two marks create very similar overall commercial impressions.

In conclusion, given confusingly similar marks applied to legally identical goods, we find there is a likelihood of confusion among consumers, when the involved marks are used on or in connection with the identified goods listed in International Class 25.

Decision: The refusals to register are hereby affirmed.